(1) Supreme Court, U.S.
FILED
991080 DEC 22 1999
OFFICE OF THE CLERK

No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC WIENER,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
Attorney for Petitioner

December 1999

73pp

QUESTIONS PRESENTED

May the "scheme or artifice to defraud" which is necessary to a federal wire (or mail) fraud prosecution be based, in a case involving the sale of an automobile, on:

(a) a defendant's failure to disclose material facts, where no fiduciary or other special relationship exists between the defendant and his customers, and no positive law creates any duty to disclose the omitted facts; and

(b) statements of the defendant which are "collateral to the bargain" and not "an inducement or motive to the [other party] to purchase ...," Smith v. Richards, 38 U.S. (13 Pet.) 26 (1839)?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Eric Wiener and the United States).

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES iv
PETITION
OPINIONS BELOW 1
JURISDICTION 1
FEDERAL STATUTE INVOLVED 2
STATEMENT OF THE CASE
a. Procedural History 2
b. Statement of Facts
i. The Jeep 3
ii. Exploring Insurance Coverage 4
iii. The Joseph Grow Transaction 5
iv. Sale of the Jeep to Robert Gullo 6
c. Statement of Lower Court Jurisdiction 7
REASONS FOR GRANTING THE WRIT
1. The Circuits continue to be fundamentally split on the question whether the concept of "fraud" under federal criminal statutes can be equated with a vague notion of "dishonesty," or whether it must be tied to a historical, legal definition. 8
2. The decision of the court below conflicts with this Court's decisions in McNally and Neder by allowing a wire fraud prosecution on a theory that would have been unrecognizable to the Congresses that enacted the mail fraud law in 1872 and 1909. 14
CONCLUSION 23

INDEX TO APPENDIX

A. Memorandum Opinion of the Court of Appeals (Aug. 4, 1999) ..... Appx. A1
B. Memorandum of the District Court denying post-trial motions (July 31, 1998) ..... Appx. B1
C. Order of the Court of Appeals denying rehearing (Sept. 23, 1999) ..... Appx. C1

TABLE OF AUTHORITIES

CASES

Barnard v. Kellogg, 77 U.S. (10 Wall.) 383 (1871) 20
Chiarella v. United States, 445 U.S. 222 (1980) 14, 15, 22
Cosby v. Buchanan, 90 U.S. (23 Wall.) 420 (1875) 20
Doyle v. Union Pacific Ry., 147 U.S. 413 (1893) 18, 20
Durland v. United States, 161 U.S. 306 (1896) 9
Farnsworth v. Duffner, 142 U.S. 43 (1891) 20
Farrar v. Churchill, 135 U.S. 609 (1890) 16
Fasulo v. United States, 272 U.S. 620 (1926) 12
Gregory v. United States, 253 F.2d 104 (5th Cir. 1958) 11
Griffin v. United States, 502 U.S. 46 (1991) 22
Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991) 10
Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884) . 20
Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817) 20
Magee v. Manhattan Life Ins. Co., 92 U.S. (2 Otto) 92 (1876) 21
McNally v. United States, 483 U.S. 350 (1987) 9, 12, 15, 19
Neder v. United States, 527 U.S. 1 (1999) 11, 15, 16, 18, 19
Reynolds v. East Dyer Development Corp., 882 F.2d 1249 (7th Cir. 1989) 13

Simmons Creek Coal Co. v. Duran,
142 U.S. 417 (1892) 20
Slaughter's Administrator v. Gerson,
80 U.S. (13 Wall.) 379 (1872) 20
Smith v. Richards, 13 Pet. (38 U.S.) 26 (1839) ..... i, 16
Stewart v. Wyoming Cattle Ranche Co.,
128 U.S. 383 (1888) 20
United States v. Bohonus,
628 F.2d 1167 (9th Cir. 1980) 11
United States v. Brandon, 17 F.3d 409 (1st Cir. 1994) . 11
United States v. Brown,
79 F.3d 1550 (11th Cir. 1996) 11-13
United States v. Goldblatt,
813 F.2d 619 (3d Cir. 1987) 10
United States v. Goodman,
984 F.2d 235 (8th Cir. 1993) 11
United States v. Hathaway,
798 F.2d 902 (6th Cir. 1986) 11
United States v. Holzer, 816 F.2d 304 (7th Cir.),
vacated, 484 U.S. 807 (1987) 11, 12
United States v. Jain, 93 F.3d 436 (8th Cir. 1996) 13
United States v. McNieve,
536 F.2d 1245 (8th Cir. 1976) 13
United States v. Monostra,
125 F.3d 183 (3d Cir. 1997) 10
United States v. Olatunji,
872 F.2d 1161 (3d Cir. 1989) 10
United States v. Ragosta,
970 F.2d 1085 (2d Cir. 1992) 11
United States v. Regent Office Supply Co.,
421 F.2d 1174 (2d Cir. 1970) 17
United States v. Schwartz, 899 F.2d 243 (3d Cir.),
cert. denied, 498 U.S. 901 (1990) 11

United States v. Starr, 816 F.2d 94 (2d Cir. 1987) .. 17, 18
United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) 10
Weiss v. United States, 122 F.2d 675 (5th Cir.), cert. denied, 314 U.S. 687 (1941) 12
Yates v. United States, 354 U.S. 298 (1957) 22

STATUTES AND RULES:

18 U.S.C. § 1341 ..... 13, 15
18 U.S.C. § 1343 ..... 2, 9
18 U.S.C. § 1344 10
18 U.S.C. § 2313 2
18 U.S.C. § 3231 7
18 U.S.C. § 3742(a) 7
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 7
Fed.R.Crim.P. 29 3
S.Ct. Rules 13.1, 13.3 1
S.Ct. Rule 14.1(g)(ii) 7

MISCELLANEOUS:

ALI, *Model Penal Code (Official Draft)* (1985) 18
2 ALI, *Model Penal Code and Commentaries (Official Draft and Revised Comments), pt. II* (1985) 18
ALI, *Restatement (Second) of Torts* (1977) 19
Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* (1888) 21
1 Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* (1890) 21
Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* (1877) 21
1 Thomas M. Cooley, *A Treatise on the Law of Torts* (3d ed. J. Lewis 1906) 21

1 Charles L. Corbin, *Benjamin's Treatise on the Law of Sale of Personal Property* (4th Amer. ed. 1893) ... 21
W. Page Keeton, Fraud -- Concealment and Non-Disclosure, 15 Tex.L.Rev. 1 (1937) 18
Prosser and Keeton on the Law of Torts (5th ed. W. Page Keeton 1984) 15, 19, 20
John W. Smith, *A Treatise on the Law of Frauds and the Statute of Frauds* (1907) 19
Joseph Story, *Commentary on Equity Jurisprudence* (1836) 16
Joseph Story, *Commentary on Equity Jurisprudence* (10th ed. 1870) 15
1 Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. M. Bigelow 1886) 21
2 Francis Wharton, *A Treatise on the Criminal Law of the United States* (7th ed. 1874) 17, 18

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ERIC WIENER respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit filed and entered on August 4, 1999.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Third Circuit (per McKee, J., with Sloviter & Nygaard, JJ.), is reproduced in Appendix A. The decision is not published, but is noted at 191 F.3d 446 (table). The district court's unpublished memorandum (Thomas I. Vanaskie, U.S.D.J.) denying post-trial motions is reproduced as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit reversing the orders of the district court was filed August 4, 1999. Appendix A. The order denying petitioner Wiener's timely petition for rehearing was filed September 23, 1999. Appendix C. This petition is timely filed on or before the ninetieth day thereafter. Rules 13.1, 13.3. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE INVOLVED

Section 1343 of title 18, United States Code, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. ....

18 U.S.C. § 1343.

STATEMENT OF THE CASE

This petition presents important questions concerning the scope of the federal mail and wire fraud statutes, a problem that this Court has addressed repeatedly over the past 90 years. Petitioner was convicted after a trial on charges that he sold an automobile that he had reason to think was stolen, and failed to disclose that fact to prospective buyers.

a. Procedural History

A federal grand jury in the Middle District of Pennsylvania charged petitioner Eric Wiener in 1995 with two counts of wire fraud, 18 U.S.C. § 1343, and one count of knowingly selling a stolen motor vehicle, in violation of 18 U.S.C. § 2313. CA3 App. 11-19. Petitioner stood trial before Judge Thomas I. Vanaskie and a jury in April 1997. CA3 App. 5-6. The defendant's moved for

judgment of acquittal on all counts under Rule 29. CA3 App. 718.

Petitioner was convicted on the two wire fraud counts (Counts I and II); the jury deadlocked on the sale of a stolen vehicle charge (Count III). CA3 App. 6. Judge Vanaskie denied post-trial motions by order dated August 31, 1998. The memorandum and order are Appx. B to this Petition.

On October 5, 1998, the district court sentenced Wiener to 15 months' imprisonment and a fine of $51,265 (of which $31,265 was tied to the cost of confinement and supervision). CA3 Aplt. Br., Add'm A. Notice of appeal was timely filed on October 14, 1998. CA3 App. 8, 257. Judge Vanaskie granted bail pending appeal. On appeal, the Third Circuit affirmed the conviction "substantially for the reasons set forth" in the district court's post-trial opinion, but vacated the sentence and remanded for reconsideration of the fine. Appx. A3. Resentencing has been postponed pending the filing of this petition.

b. Statement of Facts

The facts as related at trial are set forth in detail in the district court's opinion. App. B2-B13. Only those facts critical to the questions presented are recited here. Eric Wiener, the petitioner, dabbled in the used car business through his 1% interest in Carlisle Auto Plaza, Inc., a car dealership through which he sometimes bought vehicles for resale. Petitioner's private sale of one such vehicle -- which he had purchased without knowing it was stolen -- led to this federal criminal case.

i. <u>The Jeep.</u> On July 14, 1994, Petitioner bought a 1994 Jeep Grand Cherokee Limited ("the Jeep") from an established local used car dealer for a fair price. He soon decided to sell the Jeep, however. The government

contended at trial that petitioner decided to sell when he learned that his Jeep was apparently stolen property. On September 8, 1994, the State Police inspected another Jeep that the used car dealer had purchased from the same source and discovered that it was in fact stolen and that its VIN had been altered. The dealer gave the police a list of purchasers of these Jeeps. Appx. B3-B4.

By mid-September another car dealer had called Wiener to tell him that at least some Jeeps purchased from Wiener's source were confirmed as stolen and that the police had said "it was a very good possibility" that all the vehicles were stolen. Petitioner responded, "Mine is not stolen until they [the State Police] tell me it's stolen." Appx. B4.

ii. Exploring Insurance Coverage. The dealer who sold him the Jeep also called petitioner to say that there was a "pretty darn good" chance that Wiener's was stolen, too. Jones told Wiener that the State Police "know you have it and it will be a matter of time before they call you up ... and want you to bring it in to have it looked at." Wiener responded, "I am going to just drive it and wait for them to contact me." The dealer gave Wiener the name of his insurance agent and his insurer. Appx. B4-B5.

Wiener began inquiring into potential coverage for the price of his Jeep, in the event it turned out to be stolen. On September 16, 1994, he wrote to Erie Insurance advancing a claim on behalf of Carlisle Auto Plaza because, "some, if not all of the Jeeps that had been sold [by Jones] in recent months, are under

suspicion of being stolen." Appx. B5.[1] Petitioner made several similar insurance inquiries, stating his concern that the he might have unknowingly purchased a stolen vehicle, of which he might therefore lose possession. Appx. B6-B7.

iii. The Joseph Grow Transaction. During the same time period, petitioner undertook to sell the Jeep. On September 19 and 20, Wiener placed advertisements in the Philadelphia Inquirer and the New York Times for the sale of the Jeep, at a price slightly above what he had paid. Wiener did not advertise the Jeep in the local Harrisburg area. Appx. B7-B8.

The first serious caller was Joseph Grow, a used car dealer from West Chester, Pennsylvania, who had seen the ad in the Philadelphia Inquirer. Grow called petitioner on September 22 and made arrangements to inspect the Jeep the same day. When Grow asked petitioner why he was selling the Jeep, Wiener told him that he was looking for something bigger to tow his motorcycles. Wiener did not tell Grow that the police said some of Jeeps sold in the same batch had been stolen or that he had made inquiries concerning potential insurance coverage for his Jeep, in the event it was found to be stolen.

After inspecting the Jeep, Grow made an offer, but Wiener refused it. Two days later, on September 24, Wiener called Grow in Florida and they agreed on a $26,000 price, provided that Grow could complete the

[1] On September 19, 1994, Wiener called Carlisle's insurance agent to advise him that a potential claim existed for the Jeep, saying he suspected that it did not have good title. Wiener reported that he was making a claim against Jones and Erie Insurance, but that coverage was questionable. Appx. B6.

deal the next day.[2] Grow returned from his business trip to finalize the sale, giving petitioner $26,000 in cash. As he began to complete the title's reassignment section, however, Grow noticed that the Jeep was not manufactured in the United States. Aware of the lower value of a Canadian Jeep at auction, Grow said he wanted out of the deal. Petitioner gave Grow his money back without argument. Appx. B8-B10.

iv. Sale of the Jeep to Robert Gullo. Robert Gullo contacted petitioner during the same weekend as Grow, after seeing the ads for the Jeep in both the Philadelphia and New York papers. From New York City, Gullo called and left a message.[3] Eventually, Gullo reached petitioner and offered $25,000 for the Jeep, which was refused. After the Grow deal fell through, Wiener and Gullo agreed on a price of $26,500, provided that Gullo was able to consummate the deal that day, September 27, in Harrisburg. Appx. B10-B12.

Gullo drove from to Harrisburg to meet petitioner and pick up the Jeep. After a brief inspection of the vehicle, Gullo asked to see the title. Petitioner had obtained a new certificate, because Grow had started to fill in his other form before backing out of the deal. Because the title was in Carlisle Auto Plaza's name, rather than petitioner's, Gullo sought additional assurance that Wiener had authority to sell the vehicle.

---

[2] This interstate telephone call seeking to arrange a sale of the Jeep to Grow is charged as wire fraud in Count I of the Indictment. CA3 App. 11-16.

[3] One of Gullo's two calls from a New York hotel is charged as the interstate wire communication underlying Count II. CA3 App. 17.

Wiener showed Gullo documentation of his relationship with Carlisle Auto Plaza, and Gullo proceeded to pay for the car. As he had told Grow, Wiener advised Gullo that he was selling the Jeep because it was not large enough to tow his motorcycles. Petitioner did not inform Gullo of his suspicions that the Jeep might be stolen or that he had contacted various insurance companies to inquire about coverage for any loss he might suffer if the Jeep were stolen. Nor did Wiener advise Gullo that one of the reasons he was selling the Jeep was his feeling about the declining value of Canadian vehicles at auction. Appx. B12-B13.

Two months later, the New Jersey State Police inspected the Jeep Gullo had purchased from Wiener, and after determining that it was stolen, confiscated it. After being interviewed by the FBI, some eight months after the car was seized, petitioner refunded Gullo the full purchase price. Appx. B13.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Middle District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. CA3 App. 11-13. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

REASONS FOR GRANTING THE WRIT

1. The Circuits continue to be fundamentally split on the question whether the concept of "fraud" under federal criminal statutes can be equated with a vague notion of "dishonesty," or whether it must be tied to a historical, legal definition.

The indictment alleged that petitioner's conduct was fraudulent both because of an alleged misrepresentation,[4] and also by reason of his failure to disclose his suspicions that the Jeep was stolen property. The appellate panel adopted the trial court's post-trial opinion on these points, Appx. A3, ruling that omissions can be fraudulent even in the absence of a fiduciary relationship or some duty to disclose imposed by another applicable body of law.

> Wiener did more than give a false explanation concerning his reason for his decision to sell his jeep. ... Wiener purposefully withheld material information from both [prospective buyers] in order to fraudulently induce their decision to purchase the Jeep. ... If the infor-

[4] Petitioner argued below that the evidence of wire fraud was insufficient for three reasons. First, the proof of a "scheme to defraud" was lacking, because Wiener's allegedly false statements were collateral to the bargain. Second, the evidence did not show the statements to be false in any event. And third, the convictions could not be based upon non-disclosure, because Wiener had no special or fiduciary relationship with the victim. Focusing on legal issues rather than the particular facts of the case, this petition pursues the first and third theories.

> mation available to Wiener was of sufficient seriousness to warrant pursuing insurance coverage, it was sufficiently material to disclose to a prospective purchaser.

Appx. B20-B21. That has never been the law. This Court should grant certiorari to clarify the scope of the wire fraud statute, 18 U.S.C. § 1343, and to prevent its radical expansion by the lower courts.

While the federal fraud statutes are flexible enough to reach all sorts of schemes "designed to defraud," they do not codify through national criminal law a universal standard of total candor and full disclosure in all transactions. The apparently contrary view of the courts below is gravely mistaken.

In McNally v. United States, 483 U.S. 350, 358-59 (1987), this Court rejected the "disjunctive" reading of the mail fraud statute, under which the first ("scheme to defraud") clause is taken to be broader than the second ("to obtain money or property") and to encompass all material omissions. As the Court explained in McNally, the statute when enacted in 1872 originally contained only the "scheme to defraud" clause, which was susceptible to a rather narrow reading, in reliance on certain common law restrictions; the clause prohibiting all schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was added 1909 only to codify the holding in Durland v. United States, 161 U.S. 306 (1896), which had held the statute not to be limited to false statements of present facts.

The Second Circuit, in contrast with the court below, has plainly stated, in United States v. Von Barta, 635 F.2d 999, 1006-07 (2d Cir. 1980), cert. denied, 450

U.S. 998 (1981), a prosecution of a securities broker, that nondisclosure is not covered by the mail fraud statute without proof of some duty to disclose. 926 F.2d at 1416.[5] See also United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982) (breach of fiduciary duty to client by attorney).[6] Petitioner's failure to volunteer to prospective buyers what he had heard about the other jeeps sold by Hugh Jones simply does not support two wire fraud convictions.

The court below, like some other circuits, has sometimes expounded the scope of the federal criminal fraud laws by explaining "fraud" as:

> a broad concept that 'is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community.' United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987).

United States v. Monostra, 125 F.3d 183, 186 (3d Cir. 1997) (discussing bank fraud under 18 U.S.C. § 1344)[7];

---

[5] The Third Circuit has recognized that principle in a civil RICO case predicated on mail fraud, Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406 (3d Cir. 1991), but ironically does not apply it in criminal cases. See United States v. Olatunji, 872 F.2d 1161 (3d Cir. 1989), referring to "deceitful statements of half-truths or the concealment of material facts," 872 F.2d at 1167, as basis for conviction.

[6] As an "intangible rights" case, however, Bronston was effectively overruled on the merits by McNally.

[7] There is no difference between "fraud" in § 1344 and the use of that term in the mail and wire fraud statutes, on which the

accord, United States v. Brandon, 17 F.3d 409, 424 (1st Cir. 1994) (bank fraud); United States v. Ragosta, 970 F.2d 1085, 1090 (2d Cir. 1992); United States v. Schwartz, 899 F.2d 243, 246-47 (3d Cir.), cert. denied, 498 U.S. 901 (1990); United States v. Hathaway, 798 F.2d 902, 908 (6th Cir. 1986).

Commenting on that very passage, which derives from a 1958 Fifth Circuit case,[8] however, the Eleventh Circuit has reiterated the Seventh Circuit's warning that "such language 'cannot have been intended, and must not be taken, literally.'" United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996), quoting United States v. Holzer, 816 F.2d 304, 309 (7th Cir.), cert. granted & jmt. vacated on other grnds., 484 U.S. 807 (1987). "Never can we allow federal prosecutors to make up the law as they go along." Brown, 79 F.3d at 1562.

This Court should grant certiorari to resolve the fundamental inconsistency between the approach of courts such as the Third Circuit below, and that of the Seventh and Eleventh, which enforce a stricter limit on the scope of the mail and wire fraud statutes.[9] The merit

_____(cont'd)

more recent bank fraud law is also based. See Neder v. United States, 527 U.S. 1 (1999).

[8] See Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958).

[9] The Eighth and Ninth Circuits appear to have staked out a position straddling the two opposing views. See United States v. Goodman, 984 F.2d 235, 239 (8th Cir. 1993); United States v. Bohonus, 628 F.2d 1167, 1170-71 (9th Cir. 1980) (both urging strict construction of scope of mail fraud law, yet endorsing "fair play and right dealing" as test).

of the view opposing that taken below was well explained in Brown. Reversing the defendants' convictions, the Eleventh Circuit noted, "the fraud statutes do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions." Id. at 1562.

> As the Eleventh Circuit continued:
>
> A limitless reading of the mail [or wire] fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision. Holzer, 816 F.2d at 309.

Brown, 79 F.3d at 1556-57. Indeed, language suggesting that the fraud statutes criminalize any conduct incompatible with "moral uprightness" and "fair play" is inconsistent with McNally itself, which refused to "construe the statute in a manner that leaves its outer boundaries ambiguous." 483 U.S. at 360.[10] "'[T]here are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute.'" Id., quoting Fasulo v. United States, 272 U.S. 620, 629 (1926) (also interpreting the mail fraud statute).

The government must not be allowed to misuse the wire fraud statute to criminalize conduct that is lawful, even if ethically dubious, in the marketplace. As

---

[10] The dissenters in McNally relied on a similar Fifth Circuit elaboration of fraud, equally unsuitable for use as a criminal standard, calling it "'as old as falsehood and as versable as human ingenuity.'" 483 U.S. at 367-68, quoting Weiss v. United States, 122 F.2d 675, 681 (5th Cir.), cert. denied, 314 U.S. 687 (1941).

other Circuits have emphasized, "Not all conduct that strikes the court [or a federal prosecutor] as sharp dealing or unethical conduct is a 'scheme or artifice to defraud.'" Reynolds v. East Dyer Development Corp., 882 F.2d 1249, 1252 (7th Cir. 1989); accord, United States v. Brown, 79 F.3d at 1562. "The Government here is attempting to criminalize cupidity[,] and we do not believe that § 1341 can be extended to that extreme. ... There must be, at a minimum, a cognizable scheme to defraud." United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996), quoting United States v. McNieve, 536 F.2d 1245, 1252 (8th Cir. 1976).

The decision of the court below endorses a dangerous expansion of the scope of the mail and wire fraud laws that has no support in this Court's cases. The federal government overreached in this case by prosecuting as two counts of wire fraud (in addition to the more specific count on which petitioner was not convicted) what was at worst an isolated unfair consumer transaction. To resolve the fundamental split in the Circuits over the use of the wire and mail fraud statutes to criminalize any private or commercial conduct of which a federal prosecutor, trial judge, or appellate panel may morally disapprove, this Court should grant this petition for a writ of certiorari.

2. The decision of the court below conflicts with this Court's decisions in McNally and Neder by allowing a wire fraud prosecution on a theory that would have been unrecognizable to the Congresses that enacted the mail fraud law in 1872 and 1909.

Contrary to the holding of the court below, intent to defraud cannot be shown by concealment of a material fact unless the defendant has a duty to reveal such information to the victim. Chiarella v. United States, 445 U.S. 222, 235 (1980). No case from this Court has approved a conviction based on allegedly material omissions made by a non-fiduciary and where there was no other legal duty of disclosure. This case presents a compelling and clear factual setting in which to clarify that the common law scope of "fraud," incorporated in this respect into the federal fraud statutes, does not cover nondisclosure absent special circumstances, nor does the requirement that any affirmative misrepresentation be "material" cover statements that are "collateral to the bargain."

The absence of a duty to disclose in the circumstances of this case is particularly compelling. Petitioner was involved in arm's length negotiation for a routine, commercial transaction with two prospective buyers. Petitioner "was not their agent, he was not a fiduciary, he was not a person in whom [the potential buyers] had placed their trust and confidence. He was, in fact, a complete stranger ...." Chiarella, 445 U.S. at 232-33. The insistence of one customer, Gullo, on seeing written evidence of Wiener's right to sell a car titled to "Carlisle Auto Plaza" dramatically shows that the buyer was placing no confidence at all in the seller's word. Chiarella relied on Restatement of Torts (Second)

§ 551(2) (1977), see 445 U.S. at 228 & n.9, which would disallow even civil liability for nondisclosure in Wiener's circumstances.

The same approach that this Court applied in McNally and then again in its recent decision in Neder v. United States, 527 U.S. 1, 144 L.Ed.2d 35, 54-56, 119 S.Ct. 1827, 1839-41 (1999), shows that the government's theory of prosecution here was fatally flawed. This Court held in McNally, and reaffirmed in Neder,[11] that in enacting the mail fraud law -- the meaning of which is incorporated into the wire fraud statute at issue here[12] -- Congress intended to adopt those aspects of the law of fraud, as it had developed in 1872, which are not inconsistent with the statutory language. 119 S.Ct. at 1840. To determine those common law ingredients of fraud, the Court in Neder cited (1) the Restatement (Second) of Torts (ALI 1977); (2) the hornbook, *Prosser and Keeton on Law of Torts* (5th ed. 1984); (3) its own pre-1872 cases applying the common law of fraud; and (4) a respected contemporaneous treatise (Story's *Commentary on Equity Jurisprudence* (10th ed. 1870)). Id., 119 S.Ct. at 1840. Applying the same methodology to both petitioner's alleged misrepresentations and to his alleged material omissions, and consulting the same types of sources, shows how the court below deviated from controlling law.

---

[11] The Neder case holds that a "scheme to defraud" under the mail fraud law, 18 U.S.C. § 1341, must involve deceit which is "material." That precise point was not at issue in this case, but the Court's ratio decidendi is instructive.

[12] See Neder, 144 L.Ed.2d at 55-56 & n.7.

First, petitioner argued below that even an affirmative misrepresentation is not material, and therefore cannot be deemed fraudulent, if it is "collateral to the bargain." CA3 Aplt.Br. 16-19. The alleged misrepresentation here was the reason why petitioner was selling the Jeep. In the very sentence quoted in part last year by this Court in Neder from its 1839 decision in Smith v. Richards, 38 U.S. (13 Pet.) 26, the Court continued, "the misrepresentation must be of something material, constituting an inducement or motive to the [other party] to purchase ...," quoting 1 *Story's Equity* (1836) (emphasis added). Smith, 38 U.S. at 39.[13] Likewise, later in the Nineteenth Century, Chief Justice Fuller's decision for the Court stated:

> The general principles applicable to cases of fraudulent representation are well settled. ... The representation must be in regard to a material fact, [and] must be false .... It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material.

Farrar v. Churchill, 135 U.S. 609, 615 (1890) (emphasis added). Wharton's treatise on criminal law, in the edition closest to the date of enactment of the mail fraud law, concludes that alleged false pretenses "must have

---

[13] Perhaps ironically, Justice Story (and two others) dissented in Smith v. Richards on the basis that the record did not reveal a strong enough case of fraud. It should be noted further that the Smith case involved a situation in which the buyer had to, and did, place trust and confidence in the seller, as the buyer was not in a position to see or inspect the property being sold, which was a mine.

been the Operative Cause of the Transfer." 2 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 2120, at 555 (7th ed. 1874). These authorities support a conclusion that the exclusion of false statements "collateral to the bargain" was part of the law of fraud in 1872 when the mail fraud law was adopted, and in 1909 when it was last substantively amended, and thus continues as a limitation on the scope of the wire fraud law today.

In the leading contemporary case of United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970), salesmen for a stationery company told outright lies to potential customers in order to gain access to the customers, to win their confidence and thus in part to accomplish the sale. Id. at 1179-80. These falsehoods were charged as the instruments of mail fraud. The Second Circuit's opinion reversing the Regent Office convictions continues to inform and express the law of mail and wire fraud. Because these misrepresentations were only collateral to the sales and did not concern the quality or nature of the goods being sold, they did not go to the basis of the customers' bargain with the salesmen, the Court explained. Id. at 1182. Such representations, according to the many courts which have adopted this view, fail to evidence an intent to defraud as distinguished from an "intent to deceive, and even to induce" customers to enter into the transactions, and so cannot support a conviction. Id. at 1181. See also United States v. Starr, 816 F.2d 94, 99 (2d Cir. 1987) (because defendant's deceptions "in no way misrepresented to their customers the nature or quality of the service they were providing," no intent to defraud was proven). "Moreover, the harm contemplated must affect the very nature of the

bargain itself." Id. at 98. The so-called "misrepresentations" about why Wiener chose to sell the Jeep, on which petitioner's convictions were based, were collateral to the sale transaction and should not have been allowed to form the basis of a fraud conviction.

Second, authorities of the type relied upon in Neder greatly undermine the Third Circuit's adopted holding that material omissions from a seller's representations to a would-be buyer can be "fraudulent" even in the absence of active concealment or a duty to disclose. The Model Penal Code, for example, proposes a crime of "Theft by Deception," Code § 223.3, that includes a subsection criminalizing the failure to disclose certain questions about the seller's good title to the items to be sold -- the very sort of nondisclosure allegedly involved here. ALI, *Model Penal Code (Official Draft)* § 223.3(4), at 150 (1985). Yet the Code's commentary explains that this would be a modern addition, not supported by the traditional case law concerning false pretenses. 2 ALI, *Model Penal Code and Commentaries (Official Draft and Revised Comments), pt. II*, at 198-99 (1985). In the 1870s there was no special exception to the rule for silence with respect to the seller's doubts about his title. 2 Wharton, id. § 2106, at 548 (misrepresented warranty of title not a false pretense unless it involves "a positive statement of a material fact").[14] As noted above, under the Restate-

[14] Compare Doyle v. Union Pacific Ry., 147 U.S. 413, 427 (1893) (suggesting facts about title known to lessor but not lessee as example where duty to disclose might exist); W. Page Keeton, Fraud -- Concealment and Non-Disclosure, 15 Tex.L.Rev. 1, 19-20 (1937) (assertion of exception for facts about title, citing two state-court cases of 1923 and 1924); John W. Smith, *A Treatise on the Law of Frauds and the Statute of*

ment of Torts § 551(2), liability for nondisclosure would be disallowed.[15]

Prosser's hornbook likewise refers to "the older cases" which "commonly ... stat[e]" that an action for deceit will not lie on the basis of "mere silence, or a passive failure to disclose facts of which the defendant has knowledge ...." *Prosser and Keeton on the Law of Torts* § 106, at 737 (5th ed. W. Page Keeton 1984).[16] The only specific category of exception that Prosser & Keeton mention is for confidential or fiduciary relationships, as

(cont'd)

Frauds § 20(b), at 31 (1907) (accord). Here, petitioner did not know, but only had reason to suspect that the vehicle might be stolen property, and it is the factual basis for such suspicion that he was convicted for not disclosing.

[15] The Institute proposes in the Restatement to permit liability for failure to disclose "facts basic to the transaction," where "because of the relationship between them, the customs of the trade or other objective circumstances, [the seller knows that the buyer] would reasonably expect a disclosure of those facts." *Restatement (Second) of Torts* § 551(2)(e), at 119 (1977). Yet again, the commentary explains that this provision reflects a "continuing development of modern business ethics," id. at 124, not a traditional or common law standard. To allow such a concept to underlie a wire fraud prosecution -- which is essentially what the district court opinion adopted by the circuit does -- would thus be inconsistent with Neder's ratio decidendi.

[16] The hornbook adds, "To this general rule, if such it be, the courts have developed a number of exceptions, some of which are as yet very ill defined, and have no very definite boundaries." Id. at 738. Under Neder, following McNally v. United States, 483 U.S. 350 (1987), such "ill defined" judge-made "exceptions" cannot support federal criminal liability.

petitioner has consistently argued.[17] The decision below is inconsistent with more than a century of precedent explaining the law of fraud.

The rule that silence with respect to facts known to one party but not the other is not ordinarily fraudulent was first stated and applied in this Court by Chief Justice Marshall in Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817). It was followed throughout that Century, including the 1870's and into the era of 1909. See Doyle v. Union Pacific Ry., 147 U.S. 413, 427-28 (1893); Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383 (1888).[18] The exception for fiduciary and trust relationships was equally well settled in 1872, but even that was narrowly construed. Compare Cosby v. Buchanan, 90 U.S. (23 Wall.) 420, 454 (1875) (family trustee in estate dispute),[19] with Magee v. Manhattan Life Ins. Co.,

---

[17] "Beyond this," adds the treatise, "there has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." Id. at 739. Again, this is hardly a criminal standard tied to the understandings of 1872.

[18] Decisions of the era surrounding the enactment of the mail fraud statute commonly noted the centrality of caveat emptor to the American law of sales. See Simmons Creek Coal Co. v. Duran, 142 U.S. 417 (1892); Farnsworth v. Duffner, 142 U.S. 43 (1891); Kellogg Bridge Co. v. Hamilton, 110 U.S. 108 (1884); Slaughter's Administrator v. Gerson, 80 U.S. (13 Wall.) 379 (1872); Barnard v. Kellogg, 77 U.S. (10 Wall.) 383, 387 (1871).

[19] This case is apparently mis-cited as "Crosby" v. Buchanan in West's Supreme Court Reporter.

92 U.S. 93 (2 Otto 92) (1876) (refusing to find fraud in nondisclosure, even by surety).

Finally, treatises contemporaneous with the enactment of the mail fraud law exclude failures to disclose, in the absence of a fiduciary relationship, from the scope of what is deemed to be fraud. 1 Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* 594 (1890) ("the general rule ... declares silence to have no effect"; in "transactions between parties to confidential relations ... silence is fatal"); accord, Melville M. Bigelow, *A Treatise on the Law of Fraud on its Civil Side* ch. IX ("Silence; Duty to Speak") (1888); Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* 39, 190-92 (1877); see also 1 Thomas M. Cooley, *A Treatise on the Law of Torts* 908 (3d ed. J. Lewis 1906) ("In general mere silence, a mere failure to apprise the party with whom one is dealing of facts important for him to know for the protection of his own interest in the particular transaction, is no fraud."); 1 Charles L. Corbin, *Benjamin's Treatise on the Law of Sale of Personal Property* § 640, at 558 (4th Amer. ed. 1893) ("The mistaken belief as to facts [necessary to fraud] may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak"); see generally 1 Joseph Story, *Commentaries on Equity Jurisprudence* (13th ed. M. Bigelow 1886) (ch. VI ["Actual or Positive Fraud"], ch. VII ["Constructive Fraud"]).

Because both the "misrepresentation" and the "material omission" bases for conviction here were legally insufficient, the court below should have remanded for entry of a judgment of acquittal. Even if the Court were to find only the "concealment" theory insufficient in this

case, however, and not the "misrepresentation" averment, at least a new trial would be required. A jury's general verdict cannot survive if one of the government's theories is legally invalid. See Griffin v. United States, 502 U.S. 46, 55-56 (1991) (explaining Yates v. United States, 354 U.S. 298, 312 (1957)); Chiarella, 445 U.S. at 237 n.21. When a jury is presented, as here, with alternative legal theories, one of which is defective, the verdict must be reversed so long as it is "impossible to tell" whether the jury relied on the erroneous theory. Yates, 354 U.S. at 312. Accordingly, the court below departed from this Court's controlling precedent on a matter of essential principle under the criminal fraud statutes when it failed to award at least a new trial.

For all these reasons, this Court should issue a writ of certiorari to review and address the fundamental defects in the government's theory of prosecution in this case, under the binding precedent of this Court.

CONCLUSION

For the foregoing reasons, petitioner ERIC WIENER prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Third Circuit affirming his conviction.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
Attorney for Petitioner

December 22, 1999.

APPENDIX A

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-7540

UNITED STATES OF AMERICA
v.
ERIC WIENER,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Criminal No. 95-cr-00290
District Judge: Hon. Thomas I. Vanaskie

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 29, 1999

Present: Sloviter, Nygaard and McKee, Circuit Judges

OPINION OF THE COURT
(Filed August 4, 1999)

McKee, Circuit Judge.

We are asked to review the District Court's judgment of conviction and sentence imposed on Eric Wiener. He was convicted of two counts of wire fraud in

violation of 18 U.S.C. § 1343. Wiener alleges that the District Court erred in (1) concluding that there was sufficient evidence of his intent to defraud; (2) allowing jurors to pose questions during the trial; and (3) denying his motion for a hearing on the issue of whether the prosecutor's highlighting of exhibits already admitted into evidence constituted misconduct sufficient to require a mistrial. Wiener also complains that the sentencing court erred in applying a two-level increase for wilful obstruction of justice pursuant to U.S.S.G. § 3C1.1, and in finding that it was required to impose a fine pursuant to U.S.S.G. § 5E1.2(d)(7). For the reasons explained below, we will affirm on all assertions of error except Wiener's challange to the fine that was imposed.

I.

Wiener, an attorney practicing in Harrisburg, Pennsylvania, was indicted on November 21, 1995. The goverment charged him with two counts of wire fraud and one count of sale of a stolen vehicle. A jury convicted him of both wire fraud counts, but deadlocked on the count charging sale of a stolen vehicle in violation of 18 U.S.C. § 2313, and the court declared a mistrial as to that count.

Wiener filed post-trial motions seeking a judgment of acquittal, an arrest of judgment, and a new trial. The District Court denied each motion. The court held that (1) sufficient evidence existed to support the wire fraud convictions; (2) Wiener's claim of selective prosecution was without merit; and (3) that [sic] although the prosecutor's actions in highlighting exhibits was "improper," as Wiener claimed, it did not prejudice the defendant. The court restored that "(1) there had been extensive highlighting of exhibits, without objection,

before their admission into evidence, and (2) the evidence against Wiener on the wire fraud counts was overwhelming." Dist. Ct. Op. at 2.

II.

We have reviewed the memorandum filed by the District Court on August 31, 1998, and we will, with one exception, affirm substantially for the reasons set forth therein. That exception involves the fine that the District Court imposed.

To the government's credit, it concedes that the District Court erroneously concluded that it was obligated to impose fines and costs. The obligation which had been contained in the guidelines was rescinded by Sentencing Guideline Amendment 572, effective November 1, 1997. Thus, the court was not obligated to impose the fine here, though discretion to impose an appropriate fine for costs remained. However, since the fine here was imposed pursuant to an error of law we will remand to the District Court for resentencing consisting of a reconsideration of the amount of the fine to be imposed, if any.

Lastly, we reject Wiener's argument regarding jury questioning for the reasons set forth in United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999). For the foregoing reasons, we will affirm the judgment of conviction and sentence but will remand for reconsideration of the imposition of the fine.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Theodore A. McKee
Circuit Judge

DATED: August 4, 1999

APPENDIX B

FILED
SCRANTON
AUG 31 1998
PER [illegible]
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	**No. 3:CR-95-290**
vs.	:	
	:	**(HON. THOMAS**
ERIC J. WIENER,	:	**I. VANASKIE)**
Defendant.	:	

MEMORANDUM

Defendant Eric J. Wiener, Jr., an attorney practicing law in the Harrisburg, Pennsylvania area, was indicted on November 21, 1995. The government charged Wiener with two (2) counts of Wire Fraud (Counts I and II) and one (1) count of Sale of a Stolen Vehicle (Count III) in connection with his attempt to sell and ultimate sale of a 1994 Jeep Grand Cherokee Limited. On April 28, 1997, following a five (5) day trial, a jury convicted Wiener of the wire fraud charges but deadlocked on the sale of a stolen vehicle count.

On May 2, 1997, Wiener timely filed several post-trial motions. (Dkt. Entry 58.) Specifically, Wiener

moved for a judgment of acquittal, contending that there was insufficient evidence to support his conviction for wire fraud and that the jury verdict was inconsistent as the jury failed to reach a verdict on the sale of a stolen vehicle count. Wiener also moved for an arrest of judgment, contending that (1) the government had failed to demonstrate that he had committed an unlawful offense; and (2) the jury's inability to reach a unanimous verdict on the remaining count created an inconsistency in the verdict. Finally, Wiener moved for a new trial, arguing that this Court improperly denied his motion for dismissal based upon selective prosecution, and that the jury was improperly influenced by reason of the prosecutor having "highlighted" certain portions of exhibits after their admission but prior to their being submitted to the jury during deliberations.

Having carefully reviewed the record, I find that there was ample evidence to support the wire fraud convictions and there was no fatal inconsistency in the jury failing to reach a verdict on the remaining count of sale of a stolen vehicle. Wiener's selective prosecution claim is also without merit. While I do find that the highlighting of exhibits after they were admitted into evidence was improper, I am unable to find that Wiener was prejudiced by this misconduct in light of the fact that (1) there had been extensive highlighting of exhibits, without objection, before their admission into evidence, and (2) the evidence against Wiener on the wire fraud counts was overwhelming. Accordingly, Wiener's post-trial motions will be denied.

I. BACKGROUND

On July 14, 1994, Wiener purchased a 1994 Jeep Grand Cherokee Limited (hereinafter referred to as the

Jeep) from Jones Motor Cars, Ltd., for $26,500. (Govt's Ex. 1; Tr. 26, 36.) Wiener purchased the Jeep under the name of Carisle Auto Plaza, Inc., an automobile dealership in which he had a limited ownership. (Govt's Exs. 1 & 2; Tr. 42-43, 45, 47.)[1] The Jeep was one of approximately 30 Canadian Jeeps that Hugh Jones, the owner of Jones Motor Cars, had purchased from Arlen Duplissey of Massena, New York. (Tr. 12-14, 16.)[2]

On September 8, 1994, the Pennsylvania State Police inspected one of the Jeeps that Hugh Jones had purchased from Arlen Duplissey and discovered that it had been stolen and the Vehicle Identification Number (VIN) had been altered. (Tr. 50, 59-65, 116, 121-26, 410-

---

[1] Wiener, who owned only 1% of the outstanding stock in Carlisle Auto Plaza, (Tr. 428) had constructed an arrangement through which he could deal independently under the corporate name of Carlisle Auto Plaza. (Tr. 433.) Under this arrangement, Paul Gettel, the owner of 98% of the outstanding stock in Carlisle Auto Plaza, allowed Wiener to use his dealership license, but Gettel did not share in the profits generated or liabilities incurred by Wiener in his automobile dealings. (Tr. 433.)

[2] Hugh Jones testified that initially he suspected that the Jeeps might be stolen, so he had Harold England, a Harrisburg Jeep dealer, run the Vehicle Identification Numbers (VIN) through the Chrysler Motors' computer system under the warranty checking system. (Tr. 97.) All of the Jeeps checked out under this system. (Tr. 97-98.) Moreover, the French Canadian titles for the Jeeps also cleared when they were presented to the Pennsylvania Department of Transportation. (Tr. 98-99.) After checking the titles with Chrysler and PennDot, Jones was satisfied that the vehicles were not stolen. (Tr. 99.)

11.) Hugh Jones then provided the Pennsylvania State Police with a list of the customers to whom he had sold the Canadian Jeeps. (Tr. 66-67, 411.)

The Pennsylvania State Police first contacted Harold England, a Jeep dealer who had purchased 14 of the Canadian Jeeps from Jones and sold all but one of those Jeeps to customers. (Tr. 412, 516, 518.) England arranged for his customers to bring the Jeeps into his dealership for inspection by the State Police and provided his customers with replacement vehicles. (Tr. 412, 519-20.) From that point, the State Police then inspected 9 of Jones' Canadian Jeeps that had been sold to Lancaster County Motors. (Tr. 413.) It took the State Police approximately four to six weeks to inspect these Jeeps. (Tr. 415.) All of these vehicles had false VIN numbers. (Tr. 416.) While the State Police were inspecting his Jeeps, England called Wiener to inform him that two of his Jeeps had been confirmed as stolen and that there was a good possibility that the State Police would discover upon inspection that all of the Canadian Jeeps purchased from Jones were stolen. (Tr. 522, 526, 542.) England suggested to Wiener that he call the State Police and arrange for them to check his Jeep. (Tr. 522.) Wiener responded that he would not consider his Jeep stolen until the State Police arrived and told him that it was a stolen vehicle. (Tr. 523.)

Wiener called Hugh Jones to inquire whether it was true that the Canadian Jeeps were stolen. (Tr. 75.) Jones told Wiener that it was true and that there was a "pretty darn good chance" that his was also stolen. (Tr. 76.) Jones explained to Wiener that he had told the State Police that Wiener had purchased one of the Jeeps and that it was only a matter of time until the State Police

came to inspect his Jeep. (Tr. 76, 128, 131-32, 416.) Wiener indicated that he would continue to drive the Jeep until he was contacted by the State Police. (Tr. 76.) In response to Wiener's inquiries, Jones told Wiener that he was not able to reimburse the purchase price for the Jeep, but Jones did give Wiener the name of his insurance agent and suggested that Wiener contact him concerning potential coverage. (Tr. 77, 132-33.)

Thereafter, later in September, Wiener again called Jones to inquire into means through which he could sell his Jeep. (Tr. 81.) Jones told Wiener that he could not take it to an auction because the security had been alerted to the problem of stolen Canadian Jeeps. (Tr. at 81-82.) Jones claimed that Wiener told him that he had to get rid of the Jeep and that he was going to place an ad in papers that were out of the area and try to sell it to someone outside Harrisburg. (Tr. 82.) Wiener told Jones that he wanted to sell the vehicle outside the area because no one would find the vehicle. (Tr. 88, 139.) Jones testified that he told Wiener that the State Police knew he had the vehicle, to which Wiener responded that he would rather "fight with his money in his pocket." (Tr. 83.) Despite having knowledge that the State Police were interested in inspecting his vehicle, Wiener never contacted the State Police to arrange an inspection of his Jeep. (Tr. 417.)

On September 16, 1994, Wiener sent a letter to Erie Insurance Exchange, in which he claimed to represent Carlisle Auto Plaza in connection with its purchase of a Jeep from Jones Motor Cars, Ltd. for $26,500. (Govt Ex. 3.) In that letter, Wiener stated "some, if not all of the jeeps that had been sold [by Jones] in recent months, are under suspicion of being stolen." (Id.)

Wiener requested that a claim be presented on behalf of Carlisle Auto Plaza. (Id.) Wiener also indicated that all inquiries should be sent to his address. (Id.)

Wiener also called Bill Fickel of J. Rodney Fickel Insurance, which insured Carlisle Auto Plaza, to inform him that a potential claim existed in regard to a vehicle that Wiener suspected did not have a good title. (Tr. 257.) On September 19, 1994, as a result of his conversation with Wiener, Bill Fickel completed an "Accord Form," which stated: "Wiener apparently purchased vehicle that was stolen -- seeking compensation for the $26,500 purchase price. Jones Mtr. Co. reportedly purchased 60 Jeeps & distributed & reportedly all were stolen vehicles." (Govt Ex. 6.) This form also stated: "Wiener initially making claim against Jones Co./Erie but feels coverage may be questionable." (Id.) Later that day, Bill Fickel also sent an e-mail to General Accident Group, the underwriter of Carlisle Auto Plaza's insurance, indicating that Carlisle Auto Plaza requested to add coverage for vehicles that were later determined to be stolen. (Govt Ex. 45.)[3]

On September 19, 1994, Jeffrey Starnowsky, an adjuster for General Accident Insurance Company, called Wiener after receiving the Accord Form from Bill Fickel. (Tr. 315; Govt Ex. 4.) Wiener was not available, but returned Jeffrey Starnowsky's call later in the day. (Tr. 316.) Wiener told Starnowsky that there was no

---

[3] On October 20, 1994, General Accident responded to this inquiry, stating that the additional coverage would cost $295. (Tr. 271; Govt Ex. 46.) On October 20, 1994, this coverage was added to the Carlisle Auto Plaza policy. (Tr. 272; Govt Ex. 47.)

false pretense coverage. (Tr. 318.) He also indicated that many of the jeeps that had been sold by Jones were stolen. (Tr. 317.)

David Shiner, a customer service manager for the Shiner Insurance Agency, testified that Hugh Jones obtained insurance coverage for his car dealership through Shiner Insurance Agency. The insurance was underwritten by Erie Insurance Exchange. (Tr. 150-51.) On September 19, 1994, Wiener called the Shiner Insurance Agency and spoke with David Shiner. (Tr. 155.)[4] Wiener called to inquire as to whether Jones had coverage under his dealership's insurance for a stolen vehicle. (Id.) Wiener was informed that there was no such coverage under Jones' policy. (Tr. 158; Govt Ex. 43.)

On September 19, 1994, Wiener also called Richard Minner, a claims adjuster for Erie Insurance Exchange, the company that carried Jones' policy. (Govt Ex. 5.) Wiener inquired as to whether a claim had been set up in relation to a stolen vehicle. (Id.) Minner stated that he did not know if there was coverage and he did not know whether a claim had been set up. (Id.)

On that same day, Wiener also called the Philadelphia Inquirer and placed an advertisement for the sale of his Jeep, which ran for several consecutive days from September 20, 1994 through September 26, 1994. (Govt

---

[4] David Shiner testified that on September 16, 1994, an "attorney" for Carisle Auto Plaza called Shiner Insurance Agency. (Tr. 154.) David Shiner was not certain whether Wiener placed that call. (Id.) In any event, this "attorney" was informed that there was no coverage for the stolen car. (Tr. 159-60.)

Ex. 53.) The ad listed the sales price as $26,900. (Tr. 211.)[5] On September 20, 1994, Wiener called the New York Times to place an advertisement for his Jeep. (Govt Ex. 54; Tr. 459.) This advertisement appeared in the New York Times on September 22 through September 25, 1994. (Govt Ex. 54; Tr. 459.)

On September 20, 1994, Jeffrey Starnowsky, the General Accident adjuster, called Wiener again. Wiener told Starnowsky that he was not sure whether his Jeep was stolen. (Tr. 324.) Wiener also represented that Carlisle Auto Plaza was not trying to sell the Jeep and that it was still on the "lot." (Tr. 324-26.) Starnowsky warned Wiener that Carlisle Auto Plaza could not sell the Jeep in good faith with the suspicion that it was a stolen vehicle. (Tr. 325.) Wiener did not indicated that he had placed advertisements for the sale of the Jeep in several major metropolitan newspapers. (Tr. 326.) On September 22, 1994, General Accident mailed a reservation of rights letter to Carlisle Auto Plaza, in which General Accident indicated that there were coverage issues that needed to be resolved in regard to any reimbursement for the stolen Jeep. (Tr. 328-29; Govt Ex. 10.)

On September 22, 1994, Joseph Grow, a used car dealer from West Chester, Pennsylvania, saw the ad in the Philadelphia Inquirer and called Wiener to ask about the vehicle. (Tr. 205.) Grow made arrangements with Wiener to inspect the vehicle that same day. (Tr. 206.) When questioned as to the reason that he was selling the

---

[5] Dianne Day, classified advertising manager of the Patriot News, a Harrisburg newspaper, testified that Wiener never placed an advertisement for his Jeep in the Patriot News. (Tr. 303-04.)

Jeep, Wiener responded that he was looking for something bigger to tow his Harley Davidson motorcycles. (Tr. 209-11.) Grow made him an offer in the range of $24,000 to $26,000. (Tr. 211.) Wiener indicated that he had just placed the ad and that he wanted to see if any party was willing to pay the full $26,900. (Id.) Grow informed Wiener that he was flying to Florida for business, so he gave Wiener a business card with his pager number on it and told Wiener to call him if Wiener was interested in accepting his offer. (Tr. 212-13.)

On September 24, 1994, Wiener paged Grow in Florida and indicated that he accepted Grow's offer. (Tr. 214.) Wiener stated that he wanted to complete the deal as quickly as possible and asked if Grow could return from Florida on the following day, September 25, 1994. (Tr. 215.) Grow made the arrangements to change his flight and arrived at Wiener's residence in the early afternoon of September 25, 1994. (Tr. 215-17.) Grow gave Wiener the money and filled in the reassignment section of the title. (Tr. 218.) Grow then noticed that the face of the title indicated that the Jeep was foreign, a fact that Wiener had not revealed. (Tr. 218.) Because such vehicles result in lower auction bids, Grow determined that he no longer wanted to purchase the vehicle. (Tr. 219.) Wiener then gave Grow his money back. Grow paid Wiener $20 for a duplicate title because Grow had filled out the reassignment portion of the title prior to noticing that the vehicle was manufactured in Canada. (Tr. 220.) Wiener never informed Grow of his conversations with Jones and England concerning the fact that jeeps sold by Jones were determined to be stolen or of Wiener's claims to the various insurance companies. (Tr. 221.) Grow testified

that had he been informed of these facts, he would not have had any interest in the Jeep. (Tr. 222.)

During the same time period that Wiener was negotiating with Grow, Robert Gullo saw Wiener's ad in both the Philadelphia Inquirer and the New York Times. (Tr. 461.) While he was on a weekend vacation in New York City, Gullo called Wiener. (Tr. 462-65.) In response to questioning by Gullo, Wiener explained that he was selling the Jeep because it was not large enough to tow his Harley-Davidson motorcycles. Gullo offered $25,000, which Wiener refused. (Tr. 463.)[6] Gullo and Wiener continued to negotiate on the price for several days. (Tr. 464.)

After his failed transaction with Grow, Wiener then called Jones to attempt to get a new title for the Jeep after his title had been defaced. (Tr. 84.) Jones refused to assist Wiener in obtaining the new title, but did inform him as to the manner in which to replace a defaced title. (Tr. 84-85.)

On September 26, 1994, Wiener applied to the Pennsylvania Department of Motor Vehicles to replace his defaced title. (Tr. 377.)[7] On September 27, 1994, a new title was issued to Carlisle Auto Plaza for Wiener's Jeep. (Tr. 378.)

---

[6] According to Harold England, a Jeep dealer, the 1994 Grand Cherokee Limited with a V-8 engine has a towing capacity of 6,000 pounds and could tow two Harley Davidson motorcycles. (Tr. 539.)

[7] In applying for this new title, Wiener forged Jake Grow's signature and had one of his legal secretary's notarize the document. (Tr. 406-07.)

On September 26, 1994, Richard Minner, the claims adjuster for Erie Insurance Exchange, received the September 16, 1994 letter from Wiener inquiring about errors and omissions coverage. (Govt Ex. 12.) In a telephone call to Wiener, Minner again indicated that he was not aware of any coverage and that the claim was being investigated. (Id.; Tr. 174.) Wiener never indicated that he had purchased the Jeep; rather, he always stated that it had been purchased by Carlisle Auto Plaza. (Tr. 176.)

On September 20, 1994, after a conversation with Jones, Robert Rembisz voluntarily called the State Police and arranged for the inspection of the Canadian Jeep that he had purchased from Jones. (Tr. 581.) It was determined that Rembisz's Canadian Jeep was also stolen. (Tr. 582.) After discovering that Wiener was in a similar position, Rembisz called him on the morning of September 27, 1994. (Tr. 584.) After Rembisz told Wiener about the action that he had taken, Wiener responded that he had decided to keep his Jeep until the State Police came for it. (Tr. 586.) Wiener did not tell Rembisz that he was then engaged in negotiations to sell the Jeep, having placed advertisements in out-of-the-area newspapers for this purpose. (Id.)

On September 27, 1994, Gullo and Wiener agreed to a purchase price of $26,500. (Id. at 464.) Wiener stated that if Gullo did not pay for and pick up the Jeep on that day, he would sell it to a dealership in New York. (Tr. 465.) In other words, Wiener conditioned the sale of the Jeep upon consummation of the deal on that same day. Gulio immediately telephoned his bank, borrowed $20,000 and received a certified check for that amount made out to Wiener. (Tr. 465-66.) The remainder of the

purchase price ($6,500 in cash) was borrowed from Gullo's business. (Tr. 466.)

Gullo then drove to Harrisburg and met Wiener at his residence during the evening hours. (Tr. 466.) When Gullo received the title, he noticed that the title was not in Wiener's name; instead, it was under Carlisle Auto Plaza. (Tr. 468.) Wiener reassured Gullo that he was associated with Carlisle Auto Plaza and that he had power of attorney to transfer the title. (Tr. 468.) After a physical inspection, Gullo determined that the VIN number on the title and the VIN number of the dash-board of the Jeep were identical. (Tr. 468.) Because Gullo was still nervous, Wiener placed a phone call and allowed Gullo to speak with an individual that Wiener claimed was connected with Carlisle Auto Plaza. (Tr. 468-69.) This individual told Gullo that Wiener had the authority to transfer the title. (Tr. 469.) Gullo, however, remained unconvinced. (Tr. 470.) Wiener then suggested that the parties travel to his law office in Harrisburg where Wiener kept his corporate share in Carlisle Auto Plaza. (Tr. 470.) After seeing the luxurious law offices and the corporate share for Carlisle Auto Plaza, Gullo was convinced that Wiener had the authority to sell the Jeep. (Tr. 470.)

At this point, Gullo gave Wiener the $20,000 check and $6,500 in cash. (Tr. 471.) On the receipt, however, Wiener wrote that the purchase price was $20,000. Gullo did not ask Wiener to do this, nor did he object as he would ultimately save some money on the sales tax in New Jersey. (Tr. 472.) Wiener then signed the title to the Jeep over to Gullo. (Tr. 473.) At no point in the negotiations did Wiener ever inform Gullo of his suspicions that the Jeep was stolen or that he had

contacted various insurance agencies to inquire as to coverage for any loss he might suffer if the Jeep were stolen. (Tr. 477.)

On September 30, 1994, Wiener again called Richard Minner, the claims adjuster for Erie Insurance Exchange, and left a message on his answering machine. (Tr. 180; Govt Ex. 21.) In that message, Wiener indicated that the "matter" had been resolved. (Govt Ex. 21.)

On November 24, 1994, the New Jersey State Police inspected and confiscated the Jeep that Gullo purchased from Wiener. (Tr. 483, 504.) Gullo then contacted an attorney and attempted to get a refund from Wiener. (Tr. 483.) Wiener never informed Gullo's attorney that he had contacted insurance companies prior to the sale and determined that there was no coverage. (Tr. 609.) In fact, Wiener represented to Gullo's attorney that he would present the claim to various insurance agencies in an attempt to get Gullo's purchase price refunded. (Tr. 604.) Because of Wiener's refusal to refund the purchase price, Gullo's attorney offered to compromise the claim for $15,000. (Tr. 484, 608.) Wiener refused to accept even a partial settlement and continued to represent that he was attempting to obtain coverage under Carlisle Auto Plaza's insurance policy with General Accident. (Tr. 486, 613.) Finally, in July of 1995, after Gullo had testified before a federal grand jury, Wiener refunded the purchase price to Gullo. (Tr. 494, 617-18.)

II.DISCUSSION

A. Motion for Judgment of Acquittal

1. Standard of Review

In considering a motion for acquittal based on the alleged inadequacy or the evidence, the Third Circuit has stated:

> [R]eview of the sufficiency of the evidence is governed by strict principles of deference to a jury's findings, such that we draw all reasonable inferences in favor of the jury verdict. We will overturn a verdict only if no reasonable juror could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. Consequently, a claim of insufficiency places a very heavy burden on [the defendant].

United States v. Anderskow, 88 F.3d 245, 251 (3d Cir.) (internal quotation marks omitted) (citations omitted), cert. denied, 117 S. Ct. 613 (1996). "[T]he evidence need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt." United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). "When examining the sufficiency of the evidence, the court reviews the totality of the circumstances." United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984). "The evidence is to be viewed 'not in isolation but in conjunction.'" United States v. Mariani, 725 F.2d 862, 865 (2d Cir. 1984). The analysis must take into consideration all the government's evidence, regardless of a jury's conclusion that the evidence as to a particular count was inadequate to convince it of guilt beyond a reasonable doubt. As explained in United States v. Powell, 469 U.S. 57, 67 (1984):

> Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt. This review should be

independent of the jury's determination that evidence on another count was insufficient. [Emphasis added.]

In this case, the jury did not acquit Wiener on any of the counts. Wiener was convicted on two counts of wire fraud, but the jury was unable to reach a verdict as to Count 3 -- knowingly selling a stolen automobile in interstate commerce. Wiener argues that the jury's inability to reach a verdict on Count 3 is inconsistent with its guilty verdicts on Counts 1 and 2 in that Wiener could not be guilty of fraudulent conduct if he did not know that his Jeep was stolen. Wiener's argument is without merit. First, the jury never made any determination as to whether the government had established beyond a reasonable doubt that Wiener actually knew that his Jeep was stolen.[8] In this regard, Wiener was not acquitted on Count 3; instead, the jury simply failed to reach a unanimous verdict on that count. As the case law indicates, the jury's inability to reach a unanimous verdict on some of the counts has no bearing upon a court's consideration of the sufficiency of the government's evidence. Instead, the evidence on each count must be viewed independently in a light favorable to the government without consideration of a jury's failure to reach a verdict as to the remaining counts. Therefore, Wiener's motion for judgment of acquittal based upon an alleged inconsistency in the verdict when considered in light of

---

[8] The jury was instructed that if it found that Wiener actually believed the Jeep was not stolen, it could not convict him on this count even though he had information that would lead a reasonable person to conclude that the vehicle was stolen. (Tr. 807.)

the jury's inability to reach a unanimous verdict as to Count 3 is without merit and will be denied.

2. Review of the Evidence Presented at Trial

Wiener's challenge to the sufficiency of the evidence to support the wire fraud convictions is also without merit. In order to establish a wire fraud violation under 18 U.S.C. § 1343, the government must demonstrate: (1) a scheme to defraud; and (2) the use of an interstate wire for the purpose of executing, or attempting to execute, the scheme. United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994). The use of the wires must further the scheme to defraud or be an essential part of the scheme. Id.

In this case, Count 1 alleged that Wiener used interstate wire communications to attempt to effectuate a scheme to defraud Joseph Grow. The evidence showed that Wiener had knowledge in early September 1994 that there was a probability that his Jeep was one of Jones' stolen Canadian jeeps.[9] Wiener was aware that other jeeps sold by Jones had been determined by the State Police to have been stolen. Moreover, Wiener began calling numerous insurance companies to inquire as to whether there would be coverage in the event that his Jeep was found to be stolen. As a result of these conversations, Wiener discovered that he would not be covered for the loss of the Jeep.

Further, the government also presented evidence that Wiener had conversations with other individuals who

---

[9] In the summer of 1995, Wiener admitted to FBI Special Agent Bonczek that toward the end of the summer of 1994 England had told Wiener there was a probability that Wiener's Jeep had been stolen. (Tr. 542.)

made him aware of the situation with the Canadian Jeeps. In fact, Jones testified that he told Wiener that there was a good possibility that his Jeep was also stolen. Jones also testified that Wiener stated that he would not voluntarily turn his Jeep over to the State Police. Thereafter, Jones testified that Wiener had called him to inquire about how he could sell the Jeep, indicating that he wanted to sell it outside the Harrisburg area. In furtherance of this scheme, Wiener took out advertisements with the New York Times and the Philadelphia Inquirer, offering to sell his Jeep for $26,900. As a result of this advertisement, Joseph Grow contacted Wiener over the telephone and traveled to Harrisburg, Pennsylvania to inspect the Jeep. In his telephone conversation with Grow, Wiener failed to inform Grow that he was aware of information suggesting that his Jeep was stolen or that he had contacted several insurance companies concerning potential coverage in the event that the Jeep had indeed been stolen. Moreover, when Grow questioned Wiener regarding his reasons for wanting to sell his Jeep, Wiener failed to disclose his suspicions that the Jeep was stolen; instead, he stated that he wanted a larger vehicle to tow his Harley Davidson motorcycles.

Although Wiener contended that he did not seek to sell his Jeep because of the suspicions that it was stolen, the jury clearly disbelieved his testimony. The government presented evidence that called into question Wiener's credibility on this issue. For instance, Wiener placed his advertisements after receiving information that Jones' jeeps were stolen and that various insurance companies would not provide coverage. Moreover, Wiener initially rejected Grow's offer of $26,000, but two days later called Grow in Florida and accepted the offer

and required Grow to return from Florida the next day to consummate the deal. These actions suggest that Wiener was attempting to sell the vehicle in a rushed fashion. The same urgency to unload the Jeep was conveyed to Gullo.

The government presented evidence that interstate wire communications were made in that Wiener called Grow's beeper number while he was in Florida and Grow returned Wiener's call from Florida. These communications were in furtherance of Wiener's scheme to sell his Jeep to an unsuspecting third party prior to the State Police confiscating it. Wiener failed to disclose his knowledge concerning the suspicious circumstances regarding the Jeep or that he had contacted various insurance companies regarding potential coverage. Wiener also affirmatively misrepresented that he wanted to get a larger vehicle to tow his motorcycles, when the evidence demonstrated that Wiener actually purchased a smaller vehicle after the sale of the Jeep. (Wiener Tr. 126-27.)[10] In short, there was sufficient evidence to demonstrate that Wiener used interstate wire communications in furtherance of his attempt to effectuate a scheme to defraud Grow into purchasing the Jeep despite Wiener's concerns that it was a stolen vehicle. See Frey, 42 F.3d at 800 ("This court has noted that the success of the scheme is not relevant in a mail or wire fraud conviction; it is sufficient that the defendant had the intent to defraud.").

---

[10] Wiener's testimony was transcribed separately so that the transcript pages do not fall in numerical sequence with the rest of the trial proceedings.

Count 2 charged Wiener with the use of interstate wire communications to execute a scheme to defraud Robert Gullo. In this regard, the evidence equally supports Counts 1 and 2. After the transaction with Grow had failed and Grow had defaced the title, Wiener acted quickly to obtain a new title and consummate a deal with Gullo. Wiener received a new title within 48 hours of Grow's decision not to purchase the Jeep. On September 27, 1994, Wiener informed Gullo that if he wanted to purchase the Jeep, he would have to come from New Jersey on that day with the full purchase price. A jury could reasonably conclude that Wiener wanted to unload the Jeep before the State Police caught up with it. The fact that Wiener placed advertisements in the Philadelphia and New York papers further supports the conclusion that he was attempting to evade an investigation as to whether the Jeep was stolen. The government proved that there were interstate wire communications between Wiener and Gullo. It was also undisputed that Wiener did not inform Gullo that he suspected that his Jeep was stolen or that he had contacted various insurance companies concerning coverage. Furthermore, Wiener affirmatively misrepresented his reason for selling the Jeep, again claiming that he was looking for a larger vehicle to tow his motorcycles. In light of these representations, Gullo purchased the jeep from Wiener without knowledge that it was one of a group of Canadian Jeeps, all of which had proven to be stolen. Wiener purposefully omitted these pertinent facts in an effort to effectuate his scheme, i.e., fraudulently acquiring a full purchase price for his Jeep from Gullo to avoid the loss upon its detection as stolen.

Wiener's argument that the government failed to demonstrate any illegal conduct is without merit. Under the wire fraud statute, the government must demonstrate that Wiener used interstate wire communications to effectuate a scheme to defraud. He argues that he was under no obligation to make known his suspicions that his jeep was stolen. Wiener further contends that his misrepresentations and omissions were no worse than failing to tell a prospective purchaser that an automobile needed an oil change. Wiener contends that "giving a potential buyer a false explanation for why one wishes to sell a vehicle simply is not a crime." (Def's Supp. Br. (Dkt. Entry 63) at 10.)

A fraudulent misrepresentation "may be effected by deceitful statements of half-truths or the concealment of material facts and the devising of a scheme for obtaining money or property by such statements or concealments." United States v. Olatunji, 872 F.2d 1161, 1167 (3d Cir. 1989). Wiener did more than give a false explanation concerning his reason for his decision to sell his jeep. The evidence supports a finding that Wiener purposefully withheld material information from both Grow and Gullo in order to fraudulently induce their decision to purchase the Jeep. It cannot reasonably be maintained that a consumer would knowingly purchase a vehicle when the facts support a probability that the vehicle was stolen. Although Wiener contends that he had no obligation to reveal "suspicions" or "rumors" (Def's Supp. Br. (Dkt. Entry 63) at 11), the information available to him concerning the fact that jeeps sold by Jones were found to be stolen was material to the transaction. Indeed, Wiener testified that the information available to him made him "worried about [the fact that

his Jeep might be stolen] and concerned about it enough to make an inquiry" with respect to insurance coverage. (Wiener Tr. 88.) If the information available to Wiener was of sufficient seriousness to warrant pursuing insurance coverage, it was sufficiently material to disclose to a prospective purchaser. The nondisclosure enabled Wiener to unload the Jeep to the unsuspecting Gullo. Wiener's failure to disclose material facts constituted a fraudulent misrepresentation.

Moreover, Wiener's contention that the misrepresentation was not intentional is without merit. (Def's Supp. Br. (Dkt. Entry 63) at 12.) As noted above, a reasonable jury could have concluded beyond a reasonable doubt that Wiener suspected that his Jeep was stolen and that he attempted to sell it quickly to an individual from outside the Harrisburg area prior to the State Police confiscating the vehicle. Therefore, there is sufficient evidence to support the jury's determination that Wiener intentionally made fraudulent misrepresentations.

While Wiener concedes that the government proved that interstate wire communications were made, he contends that the government failed to demonstrate that the interstate wire communications were an essential part for the scheme to defraud. (Def's Supp. Br. (Dkt. Entry 63) at 14.) Wiener argues that "[w]ith neither man did Defendant attempt to effectuate . . . the sale by giving them false explanations for the sale or concealing the fact that he believed it was stolen over the telephone." (Id. (emphasis in original).)

It is axiomatic that the interstate wire communication need not include a fraudulent representation. In order to support a wire fraud conviction, it is only neces-

sary that the use of the wire "further the scheme to defraud or be incident to an essential part of that scheme." Frey, 42 F.3d at 798. A reasonable jury could conclude beyond a reasonable doubt that the telephone communications were an essential part of Wiener's scheme to defraud. Without the interstate wire communications, neither Grow nor Gullo would have traveled to Harrisburg to inspect the Jeep. Both Grow and Gullo agreed to the purchase price over the phone, while during those telephone conversations Wiener failed to advise Gullo and Grow of facts that supported a suspicion that the Jeep was stolen. As noted, the facts of which Wiener was indisputably aware and which he concededly did not disclose were material. Although Wiener argues that he did not make any misrepresentations during the telephone conversations, his failure to disclose pertinent facts can support a wire fraud conviction. In this regard, a rational jury could reasonably conclude that the explanation for selling the Jeep given by Wiener to Gullo was false and part of the scheme to defraud. Therefore, Wiener's contention that the interstate wire communications were not in furtherance of the alleged scheme to defraud is without merit.

In short, the government presented abundant evidence from which a reasonable jury could conclude beyond a reasonable doubt that Wiener committed wire fraud in relation to his dealings with Grow and Gullo. Wiener has failed to meet the "very heavy burden" necessary for a reversal of a jury verdict. For these reasons, Wiener's motion for a judgment of acquittal will be denied.

B.Motion for Arrest of Judgment

Under Federal Rule of Criminal Procedure 34:

> The court on motion of a defendant shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after the verdict or finding of guilt . . . .

Thus, relief under Rule 34 is limited to two specific claims: (1) that the indictment failed to charge an offense; or (2) that the court lacks jurisdiction over the crimes. See United States v. Patrick, 985 F. Supp. 543, 550 (E.D. Pa. 1997), aff'd mem., No. 97-1876 (3d Cir. May 18, 1998); see also United States v. Taylor, No. 91-634, 1992 WL 333589, at *4 (E.D. Pa. Nov. 9, 1992), aff'd mem., 993 F.2d 880 (3d Cir. 1993). In his motion, Wiener does not allege that any jurisdictional defects exist. Instead, Wiener reasserts his claim that the indictment does not charge an offense "because it is not a crime when selling a vehicle not to inform the prospective purchaser that you suspect that said vehicle might be stolen." (Def's Mot. (Dkt. Entry 58) ¶ 5.) Moreover, Wiener also claims that the jury verdict is "fatally inconsistent" as a result of the failure of the jury to reach a verdict as to Count 3, i.e., that Wiener knowingly sold a stolen car in interstate commerce. (Id. ¶ 6.) As noted above, both of these claims are without merit. Furthermore, the indictment adequately charged the offenses for which Wiener was tried and convicted. Therefore, Wiener's motion to arrest judgment under Rule 34 will be denied.

C.Motion for a New Trial

Under Federal Rule of Criminal Procedure 33, a court will grant a motion for a new trial "if required in

the interest of justice." The district court must exercise its discretion in determining whether a new trial is required. See United States v. Console, 13 F.3d 641, 665 (3d Cir. 1993), cert. denied, 511 U.S. 1076 (1994); United States v. Skelton, 893 F.2d 40, 44 (3d Cir.), cert. denied, 498 U.S. 814 (1990). "A motion for a new trial is not favored and is viewed with great caution." United States v. Miller, 987 F.2d 1462, 1466 (10th Cir. 1993). Thus, a district court's power to order a new trial "should only be exercised sparingly." Patrick, 985 F. Supp. at 550. As explained in United States v. Fenech, 943 F. Supp. 480, 486 (E.D. Pa. 1996), "[i]t is a remedy to be used sparingly, reserved for exceptional circumstances, where the evidence preponderates heavily against the verdict or where failure to grant a new trial would result in a miscarriage of justice." Thus, a motion for a new trial will be granted only where there is "a reasonable probability that error in the proceedings had a substantial influence on the jury's decision." Fenech, 943 F. Supp. at 486 (citing Government of the V.I. v. Bedford, 671 F.2d 758, 762 (3d Cir. 1982)); see also Patrick, 985 F. Supp. at 550.

1. The Selective Prosecution Defense

First, Wiener contends that he is entitled to a new trial because this Court erred in denying his motion to dismiss the indictment for selective prosecution. In a Memorandum and Order dated December 20, 1996, Wiener's selective prosecution claim was considered and rejected:

> Contrary to Wiener's assertion that the charges against him stem solely from his resale of a 1994 Jeep Cherokee which, unbeknownst to him at the time of its purchase,

had been stolen, the prosecution has set forth evidence that Wiener resold the Jeep with knowledge that it was stolen in a deliberate effort to unload the vehicle on an unwitting purchaser. In this regard, the Government contends that Wiener's alleged communications with the Erie Insurance Company and General Accident Insurance, along with his alleged statements, and culpable omissions to Gullo and Grow in relation to the stolen Jeep, establish his knowledge of the stolen status of the Jeep at the time of resale. Wiener has completely failed to offer any evidence or even allege that any other individual resold a vehicle with knowledge of its stolen status, and thus has failed to show that other persons similarly situated have not been prosecuted. Thus, he has failed to make out a defense for selective prosecution. Moreover, because no evidence has been presented to show that others with reason to know of the stolen character of the vehicle in question were not prosecuted, Wiener has not made the necessary threshold showing to entitle him to a hearing on his claim of selective prosecution.

(Dkt. Entry 20, at 6 (emphasis added).) Under Local Rule 7.10, a motion for reconsideration must be filed within ten days after the entry of the judgment. Wiener failed to file a motion for reconsideration. Instead, Wiener attempts to avoid the requirements of the Local Rules by asserting his motion under Rule 33. Even if this Court were to reconsider its denial of Wiener's selective prosecution defense, the result would be the same.

The standard for determining whether to grant a motion for reconsideration is a stringent one. "The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985), cert. denied 476 U.S. 1171 (1986); see also Dodge v. Susquehanna Univ., 796 F. Supp. 829, 830 (M.D. Pa. 1992) (noting three possible grounds upon which a motion for reconsideration might be granted: "(1) intervening change in controlling law, (2) availability of new evidence not previously available, or (3) need to correct a clear error of law or prevent manifest injustice"). Further, this Court has cautioned litigants that a mere disagreement with the court does not translate into a clear error of law. Dodge, 796 F. Supp. at 830. A motion for reconsideration is not a tool to re-litigate and reargue issues which have already been considered and disposed of by the court. Id. Instead, a motion for reconsideration is appropriate where the court has patently misunderstood a party or where there has been a significant change in the law or facts since the court originally ruled on the issue. Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). Wiener has failed to present any new evidence or demonstrate that a manifest error of law occurred in the December 20, 1996 Memorandum and Order. Wiener seeks to merely relitigate the selective prosecution claim based upon his disagreement with the December 20, 1996 Memorandum and Order. In short, his assertion that he is entitled to a new trial based upon the rejection of his selective prosecution claim is without merit and will be denied.

2. Submission of "Altered" Exhibits to the Jury

Wiener contends that he is entitled to a new trial based upon the fact that the prosecutor highlighted parts of exhibits while the jury was being charged. These altered exhibits were then given to the jury during deliberations.

The prosecutor has conceded that he improperly highlighted certain "dates" on a few exhibits while the jury was being instructed. (Govt's Opp. Br. (Dkt. Entry 66) at 4.) In particular, government's counsel stated, "[s]ince the dates were not contested and the dates on the rest of the exhibits had been highlighted [prior to admission into evidence], undersigned counsel highlighted them in order to facilitate the jurors' chronological review." (Id.) The government has also presented the affidavit of FBI Special Agent Glenn A. Bonczek, in which Bonczek explained:

> "Prior to trial, almost all of the government's documentary exhibits in this case had been marked, to one extent or another, with a yellow, highlight pen. Pertinent dates, times, numbers and names on approximately 60 letters, memorandum, notes, and other business records were highlighted to facilitate the display of pertinent information to the jury on the color, courtroom video display system." (Govt's Opp. Br. (Dkt. Entry 66) Attachment A, ¶ 2; emphasis in original.)

As the government correctly notes, the majority of its exhibits were in fact highlighted prior to being displayed to the jury and prior to being admitted into evidence. These documents, with portions highlighted in yellow, were displayed to the jury during the trial without any

objection by Wiener and were admitted into evidence with highlighting without objection. Furthermore, prior to the exhibits being submitted to the jury, Wiener had the opportunity to inspect them along with the prosecutor. Wiener did not object to the yellow highlighting that appeared on the government's exhibits before they were sent to the juryroom.

It was not until after the jury had been deliberating for several hours that Wiener raised the matter of the altered exhibits. Wiener moved for a mistrial based on information from Wiener's wife and a friend, who had observed the prosecutor highlighting some exhibits during deliberations. (Tr. 834-36.) The motion for a mistrial was denied because the prosecutor had represented that only some dates had been highlighted and the additional highlighting (over and above that which was on the documents when admitted into evidence) was not regarded as prejudicial. (Tr. 838.)

Later, Wiener renewed his motion for a mistrial, claiming that his witnesses saw extensive highlighting during the court's charge to the jury. Wiener requested an evidentiary hearing. (Tr. 846.) That request, which was taken under advisement at the time it was made (id.), was effectively denied with the acceptance of the guilty verdict on the wire fraud counts.

Wiener's post-trial motion again requests an evidentiary hearing concerning the extent of highlighting done during the jury charge. In contrast to the government's approach of presenting an affidavit of a witness to the highlighting, Special Agent Bonczek, however, Wiener has not presented any affidavit or document of evidentiary value. Nor has he either made a proffer of the testimony he would intend to present at an eviden-

tiary hearing or identified a particular document he claims to have been improperly altered after it was admitted at the trial. Instead, Wiener has baldly challenged the accuracy of Bonczek's affidavit. (Def's Reply Br. (Dkt. Entry 68) at 4.)[11]

Even assuming that the improper highlighting was more extensive than Special Agent Bonczek states, an evidentiary hearing is not required. Only if it could be concluded that the improper submission of extra-record materials to the jury prejudiced the defendant is a new trial warranted. See, e.g., Government of the V. I. v. Joseph, 685 F.2d 857, 863-64 (3d Cir. 1982); see generally "Twenty-sixth Annual Review of Criminal Procedure," 85

---

[11] Wiener asserts that he reviewed the exhibits and found "[n]umerous examples of highlighting . . . in a shade of color different from that used by the Government when some of the exhibits were marked initially." (Def's Reply Br. (Dkt. Entry 68) at 2.) Wiener has failed, however, to identify the exhibits that contained the different coloring. My independent review of the exhibits reveals that of the 50 exhibits that bore some highlighting, fourteen had different shades of highlighting from the predominant shade of yellow. (Govt's Exs. 4, 6, 22(b), 23(b), 23(c), 23(d), 24, 36(b), 36(e), 36(f), 41, 42, 49, and 57.) Moreover, this different shade of highlighting did not always cover the date of the exhibit.

A visual inspection of the documents, of course, does not yield any conclusion as to when the different shade of highlighter was used. The government may have highlighted these documents with different highlighters before introducing them at trial. What is clear is that there had been substantial highlighting of exhibits before they were introduced at trial and the highlighted exhibits were admitted into evidence without objection.

Georgetown L. J. 775, 1262-68 (1997).[12] "When exhibits not in evidence reach the jury, a new trial should not be ordered unless it is shown that the evidence was so prejudicial that the defendant was denied a fair trial." United States v. Friedland, 660 F.2d 919, 928 (3d Cir. 1981), cert. denied, 456 U.S. 989 (1982). As explained in United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982), cert. denied, 459 U.S. 1228 (1983):

> A criminal defendant in our system has a right to be tried on the basis of the evidence admitted at his trial, and this right may be violated if the jury gets access to extra-record evidence . . . . But as with so much in our system of criminal justice this is the statement of an ideal rather than of a standard for when a defendant is entitled to a new trial. For that there has to be some showing of prejudice.

Id. at 940. The necessity of addressing the prejudice from concededly improper juror exposure to altered exhibits flows from Rule 52(a) of the Federal Rules of

---

[12] Neither Wiener nor the government has presented any guidance by way of case law to assess the request for a new trial based upon the improper highlighting of exhibits already admitted into evidence. Having carefully considered the issue, I believe the appropriate analytical framework is supplied, in general, by those cases that concern extraneous influences on the jury, and in particular, by those cases that address the impact of the jury's consideration of documents outside the record. Because highlighting was added after the evidentiary record was closed, cases deciding requests for a new trial based upon the jury's consideration of outside-the-record materials are most closely analogous.

Criminal Procedure, which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Id. (emphasis added). Whether there has been substantial prejudice to the defendant is to be determined "on the basis of an objective analysis by considering the probable effect of the allegedly prejudicial information on a hypothetical average juror." United States v. Gilsenan, 949 F.2d 90, 95 (3d Cir. 1991), cert. denied, 504 U.S. 987 (1992). Where substantial prejudice cannot be discerned, a new trial is not warranted. Id.

For example, in United States v. Rana, 944 F.2d 123, 128 (3d Cir. 1991), cert. denied, 502 U.S. 1077 (1992), the court found that, although use of juror notebooks that contained exhibits not yet admitted into evidence was error, a new trial was not required because no showing of prejudice had been made. In reaching this result, the court explained that "[t]he district court's error with respect to use of the notebook caused no harm because the evidence against Rana was overwhelming." Id.; see also Friedland, 660 F.2d at 928 (fact that exhibits which had been ruled inadmissible were sent to juryroom did not warrant a new trial in the absence of prejudice to the defendant); United States v. Brown, 720 F.2d 1059, 1076 (9th Cir. 1984) ("'Highlighting' by drawing transparent colored lines through certain parts is not desirable and could be misleading, but we find it highly unlikely that the practice here affected the verdict."). But see United States v. Gonzalez-Maldonado, 115 F.3d 9, 17 (1st Cir. 1997) (finding that where government provided jury with a transcript of tape recorded conversation, it could not draw the jury's attention to certain words the

government deemed important through the use of quotation marks).[13]

In United States v. Best, 939 F. 2d 425 (7th Cir. 1991) (en banc), cert. denied, 502 U.S. 1121 (1992), the government, without the knowledge of the court or defense counsel, allowed its jury books to go into the jury deliberation room. Id. at 428. After the jury returned a guilty verdict, defense counsel demanded an evidentiary hearing regarding the submission of the jury books to the jury. The district court denied this request. Id. at 429. On appeal, the defendants argued that the presence of the government's jury book during deliberations allowed the jury to follow the government's case with ease, i.e., the binders were "roadmaps for conviction" prepared by the government. Id. at 430. The Seventh Circuit rejected this argument, noting that all of the documents were properly admitted into evidence. Id. ("The binders were no more 'roadmaps to conviction' than were the ten boxes of carefully ordered evidence."). The Seventh Circuit also noted that the time to object to the use of the binders was prior to trial, not after the jury had been permitted to review the documents throughout the trial. Id. Thus, the court affirmed both the district court's refusal to hold an evidentiary hearing and the district court's denial of the defendant's motion for a new trial. Id.

In this case, extensive highlighting, drawing attention to incriminating facts, had been present on exhibits,

---

[13] It should be noted that the First Circuit did not address the issue of prejudice because it had decided to order a new trial on other grounds. Id. at 17 n.2.

which were admitted in this altered state without objection. Clearly, Wiener waived any challenge to the highlighting that occurred before the close of the record. The additional improper highlighting did not change the content of that evidentiary record, but may have drawn attention to facts favoring conviction. If a jury's exposure to inadmissible evidence, such as failed plea negotiations, Gilsenan, supra, did not result in a new trial, the jury's exposure to additional highlighting of exhibits in this case plainly does not suggest such prejudice as to warrant a new trial.

This conclusion is buttressed by a consideration of the overwhelming wire fraud case presented by the government.[14] Even errors of constitutional proportion have been regarded as "harmless" when considered in the context of the strength of the government's case. See, e.g., United States v. Balter, 91 F.3d 427, 440 (3d Cir.), cert. denied, 117 S. Ct. 518 (1996); United States v. Hurtado, 47 F.3d 577, 582 (2d Cir.), cert. denied, 516 U.S. 903 (1995); see also, United States v. Sokolow, 91 F.3d 396, 407 (3d Cir. 1996), cert. denied, 117 S. Ct. 960 (1997). The evidence convincingly established that Wiener failed to disclose his strong suspicion that the

---

[14] It is unclear whether there should be applied here a presumption of prejudice, with the burden of overcoming the presumption on the government. Compare Console, 13 F.3d at 666 (presumption of prejudice applicable to ex parte communications between juror and third party) with Gilsenan, 949 F.2d at 95 n.7 (no presumption of prejudice from jury's exposure to fact there had been unsuccessful plea negotiations). But even if a presumption of prejudice is applicable, it is rebutted by the overall facts of record.

Jeep he had purchased from Jones was stolen. The existence of such a strong suspicion could be inferred from his inquiries about insurance coverage, his misrepresentations to others about his decision to sell the Jeep, his efforts to unload the vehicle outside the Harrisburg area, his desire to close the transaction quickly, and his explanations for why he was selling the Jeep. In short, a jury could rationally conclude that when Wiener realized that he could not cover his potential loss through insurance coverage, he sought to unload the Jeep to an unwitting purchaser by not disclosing the suspicious circumstances surrounding the vehicle. In this regard, he sought to sell the vehicle to someone outside the Harrisburg area and, although he knew that the Pennsylvania State Police would ultimately seek to inspect his vehicle for purposes of confirming that it was stolen, he deliberately failed to inform prospective purchasers of this highly material fact.[15]

---

[15] The fact that the jury deadlocked on the charge of selling a stolen vehicle does not suggest weakness in the government's wire fraud case. As to the sale of a stolen vehicle charge, the government had to prove that Wiener did not actually believe that the Jeep was not stolen. As the jury was instructed:

> The government must prove beyond a reasonable doubt that the defendant knew the vehicle was stolen at the time it was sold. If the defendant lacked this knowledge you must find him not guilty, even if the government proves the only reason the defendant lacked such knowledge was because the defendant was careless, negligent or even foolish in failing to obtain it.
>
> However, it is not necessary for the government to prove to an absolute certainty that

While Wiener complains that "cross-examination relative to the exculpatory portions of the documents was diminished" by the prosecutor's improper highlighting of documents, he does not provide any specific example of any cross-examination that brought out some exculpatory part of a document. Moreover, while the highlighting was improper because it drew attention to incriminating facts, there had been extensive highlighting of incriminating parts of documents prior to the documents being admitted as evidence and Wiener did not object to that highlighting. In light of the substantial highlighting to which no objection was interposed, any incremental prejudice from drawing attention to other parts of exhibits after the exhibits had been admitted into evidence must be regarded as having no meaningful impact on the "hypothetical average juror."

_____(continued)

> the defendant knew the vehicle was stolen. The defendant's knowledge may be established by proof the defendant was aware of a high probability that the vehicle was stolen, unless, despite this high probability, the facts show the defendant actually believed the vehicle was not stolen.

(Tr. 807 (emphasis added).) But as to the wire fraud charges, the government only had to establish a material false representation (Wiener's articulated reason for selling the Jeep) or omission (Wiener's knowledge that other jeeps sold by Jones had been determined to be stolen). Thus, while some jurors could have found that Wiener actually believed the Jeep was not stolen, those same jurors could rationally conclude that Wiener made material misrepresentations and deliberately failed to disclose material facts in connection with the sale of the Jeep.

It must also be borne in mind that defense counsel had an opportunity to inspect the documents before they were submitted to the jury and did not object at the time of the submission of the exhibits to the jury. The highlighting on the documents is evident. What cannot be discerned is the highlighting that occurred before and after their admission into evidence. Clearly, the improper highlighting was not so extensive as to draw the attention of Wiener's counsel. Moreover, "[i]t is ordinarily the responsibility of counsel to check the exhibits and failure to object in a timely manner can under some circumstances constitute a waiver." Joseph, 685 F.2d at 864. In this case, any objection to the highlighting of the exhibits, both proper and improper, was waived when the defense counsel allowed the exhibits to go to the jury deliberation room without expressing any objection. Accordingly, Wiener is not entitled to a new trial on the ground that altered exhibits were presented to the jury.[16]

III. CONCLUSION

For all of the foregoing reasons, Wiener's post-trial motions (Dkt. Entry 58) are denied. An appropriate Order is attached.

/s/Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

---

[16] Denial of Wiener's motion for a new trial, of course, does not imply approbation of the prosecutor's conduct. It is appalling that an experienced prosecutor would act in such an inappropriate manner. Given the strength of the evidence and Wiener's failure to object to the use of the highlighted

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
	:	**No. 3:CR-95-290**
vs.	:	
	:	**(HON. THOMAS I.**
ERIC J. WIENER,	:	**VANASKIE)**
Defendant.	:	

ORDER
August 31, 1998

NOW, therefore, in accordance with the attached Memorandum, IT IS HEREBY ORDERED THAT:

1) Defendant's post-trial motions (Dkt. Entry 58) are **DENIED.**

2) Sentencing is scheduled for **Monday, October 5, 1998 at 1:30 p.m.** in a courtroom to be designated in the Federal Building, 228 Walnut Street, Harrisburg, Pennsylvania, 17108.

/s/Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

(continued)

evidence, however, it simply cannot be said that a reasonable probability exists that the prosecutor's conduct had any substantial impact on the jury's decision. Indeed, even if this matter was assessed as a claim of prosecutorial misconduct implicating the Sixth Amendment right of confrontation, I am convinced beyond a reasonable doubt that the improper highlighting did not contribute to the verdict.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7540

UNITED STATES OF AMERICA
v.
ERIC WIENER,
Appellant

SUR PETITION FOR REHEARING

Present: BECKER, CHIEF JUDGE,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE and RENDELL,
Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not

having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/T McKee
Circuit Judge
Hon. Theodore A. McKee

SEP 23 1999